No. 91-6

Supreme Court, U.S.
FILED
JUL 1 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

G.A.S. SERVICES, INC.,

Petitioner,

- v.

WILLIAM C. COOPER; and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

MARTHANDA J. BECKWORTH
Counsel of Record
THOMAS, GLASS, ATKINSON, HASKINS,
NELLIS & BOUDREAUX
525 South Main, Suite 1500
Tulsa, OK 74103
(918) 582-8877
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The United States District Court for the Northern District of Oklahoma remanded this removed action, holding that it "arises under the workmen's compensation laws of the State of Oklahoma," and thus, is not removable pursuant to 28 U.S.C. § 1445(c). The Tenth Circuit held that it did not have jurisdiction to consider the appeal of the district court ruling, pursuant to 28 U.S.C. § 1447(d). The questions presented are:

1. Whether the Tenth Circuit's opinion incorrectly fails to take into account the *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336 (1976), exception to 28 U.S.C. § 1447(d) whereby extraordinary remedies are available to litigants whose actions are improperly remanded?

2. Whether § 1447(d) is unconstitutional insofar as it deprives a certain class of litigants of their recourse to appellate courts?

PARTIES TO THE PROCEEDING

1. G.A.B. Services, Inc.
2. William C. Cooper
3. National Union Fire Insurance Company of Pittsburgh, Pennsylvania

LIST OF AFFILIATED CORPORATIONS

1. C.H.& A., Inc.
2. I.N.S. Investigations
3. Inter-Modal Technical Services, Inc.
4. Inter-Modal Trasportation Services, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
AFFILIATED CORPORATIONS	ii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR BRINGING THE PETITION	4
I. THE TENTH CIRCUIT'S FAILURE TO GRANT AN EXTRAORDINARY REMEDY IN THIS CASE CONFLICTS WITH THIS COURT'S DECISION IN *THERMTRON PRODUCTS, INC. V. HERMANSDORFER*	4
II. 28 U.S.C. § 1447(d) UNCONSTITUTIONALLY DEPRIVES A CERTAIN CLASS OF LITIGANTS OF THEIR ACCESS TO APPELLATE COURTS, THUS REQUIRING GRANTING OF THIS PETITION SO THAT THIS COURT CAN CONSIDER THIS IMPORTANT JURISDICTIONAL ISSUE	6
CONCLUSION	10
Court of Appeals Opinion	App. 1
District Court Opinion	App. 3
28 U.S.C. § 1441	App. 7
28 U.S.C. § 1445	App. 8
28 U.S.C. § 1447	App. 8
U.S. Const. Amend. V	App. 10
Order	App. 11

TABLE OF AUTHORITIES

Page

Boddie v. Connecticut, 91 S.Ct. 780 (1971) 9

Bor-Son Building Corp. v. Heller, 572 F.2d 174 (8th Cir. 1978) 5

California Motor Transport Co. v. Trucking Unlimited, 92 S.Ct. 609 (1972) 9

Jones v. Newton, 775 F.2d 1316 (5th Cir. 1985) 5

Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975) 8

Mahone v. Addickes Utility District of Harris County, 836 F.2d 921 (5th Cir. 1988) 7

Mathews v. deCastro, 429 U.S. 181, 182 (1976) 6

Prescott v. United States, 523 F.Supp. 918 (D.C. Nev. 1981) 7

Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976) 4

No. _____

In The

Supreme Court of the United States

October Term, 1990

G.A.B. SERVICES, INC.,

Petitioner,

v.

WILLIAM C. COOPER; and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

G.A.B. Services, Inc. respectfully petitions for a Writ of Certiorari to review the Order of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1) is unreported. The opinion of the district court (App. 3) is unreported.

JURISDICTION

The Order of the Court of Appeals was entered on March 1, 1991. Petitions for rehearing were not filed in this matter. On May 30, 1991, Justice White extended the time for filing a Writ of Certiorari to, and including, July 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 28 U.S.C. § 1441; 28 U.S.C. § 1445; 28 U.S.C. § 1447; and U.S. Const. Amend. V, which are fully set forth in the Appendix.

STATEMENT OF THE CASE

This is an action sounding in bad faith refusal to pay insurance benefits and intentional infliction of emotional distress. The action was originally brought in the District Court of the State of Oklahoma in Tulsa County. The matter was timely removed by Petitioner, G.A.B. Services, Inc. Removal was appropriate because of diversity jurisdiction based on 28 U.S.C. § 1441(a), and 28 U.S.C. § 1332.

This action arose when Respondent, Cooper, an employee of Loffland Brothers, was injured in the course of his employment, on January 10, 1985. Cooper filed a worker's compensation claim against his employer on September 12, 1986, and was awarded disability payments on October 31, 1988. In this action, Cooper alleged

that Respondent, National Union Fire Insurance Company of Pittsburgh, Pennsylvania, and Petitioner, G.A.B. Services, Inc., the administrator of the benefits, wrongfully refused to make the payments ordered by the Oklahoma Worker's Compensation Court on October 31, 1988.

As noted above, the action was originally brought in state court, and was removed to the United States District Court for the Northern District of Oklahoma. Simultaneously with the filing of removal papers, Petitioner filed a motion to dismiss, arguing that the Oklahoma Worker's Compensation Court had exclusive jurisdiction over this matter. Cooper filed an objection to the motion to dismiss, as well as a motion to remand, arguing that this action was one that "arises under" the Oklahoma Workmen's Compensation Act, and was, therefore, not removable pursuant to 28 U.S.C. § 1445(c). On June 7, 1990, the trial court ordered that this matter be remanded to state court. G.A.B. Services, Inc., filed a notice of appeal on July 6, 1990.

During the course of the appeal, Respondent, Cooper, filed a motion to dismiss the appeal and a request for sanctions. This motion to dismiss was based on 28 U.S.C. § 1447(c) and (d). The Tenth Circuit, on September 17, 1990, required that memorandum briefs be filed by all parties in support of their respective positions on the jurisdictional issue. Petitioner filed a memorandum brief arguing that, while a direct appeal may not be possible, the circumstances warranted an extraordinary remedy, and that the application of 28 U.S.C. § 1447(d) was unconstitutional in that it violated Petitioner's right to equal protection under the law and deprived Petitioner of its

recourse to an appellate court. The Tenth Circuit dismissed the appeal, holding that an extraordinary remedy was not warranted. In its Order, the Tenth Circuit did not consider Petitioner's argument that the application of § 1447(d) was unconstitutional.

REASONS FOR GRANTING THE PETITION

I.

THE TENTH CIRCUIT'S FAILURE TO GRANT AN EXTRAORDINARY REMEDY IN THIS CASE CONFLICTS WITH THIS COURT'S DECISION IN *THERMTRON PRODUCTS, INC. V. HERMANSDORFER*

The Tenth Circuit had jurisdiction to consider the trial court's erroneous remand of this action pursuant to its power to grant extraordinary remedies. In its memorandum brief on appellate jurisdiction, Petitioner pointed out that, pursuant to *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), an extraordinary remedy is available when the trial court removes on improper grounds. The Tenth Circuit's failure to consider this matter through its power to grant an extraordinary remedy was in direct contravention of this Court's holding in *Thermtron Products*.

In *Thermtron Products*, this Court held that an appellate court would have jurisdiction to consider the remand of a case to state court when the remand was issued on improper grounds. Under the facts of *Thermtron Products*, the Defendant had properly removed the case from state court, and the plaintiffs moved to remand. The federal district court remanded the case because of its crowded

docket. The defendant filed a petition for writ of mandamus or prohibition with the appropriate appellate court. The Court of Appeals for the Sixth Circuit denied the Petition, concluding that it had no jurisdiction to review the order of remand because of the prohibition against appellate review contained in 28 U.S. § 1447(d), which expressly holds that an order remanding a case is not reviewable on appeal or otherwise. However, this Court granted the Petition for Certiorari and reversed the order of the Court of Appeals, holding that the district court exceeded its authority in remanding on grounds not permitted by the controlling statute and that Petitioner was entitled to an extraordinary remedy in this instance. *Id.* at 345.

In the present case, the trial court similarly exceeded its authority in remanding this action rather than in dismissing it. The trial court had previously held that actions for bad faith refusal to pay insurance benefits lie within the exclusive jurisdiction of the Workmen's Compensation Court of the State of Oklahoma. (*See*, App. 11.) Consistent with this holding, the trial court correctly should have dismissed the action rather than remanding it to state court.

It is elementary that a court should only remand an action to state court if the state court has jurisdiction. In *Bor-Son Building Corp. v. Heller*, 572 F.2d 174 (8th Cir. 1978), the court affirmatively stated the corollary of this rule. In that case, the court stated that it was not proper for a federal court to dismiss a removed claim if the federal court found that a state court would have jurisdiction over those same claims. Similarly, in *Jones v. Newton*, 775 F.2d 1316 (5th Cir. 1985), the court held that a remand

should not be ordered unless the state court could proceed to act on the claims once it was remanded.

The trial court remanded this action to state court, a court which did not have jurisdiction over the matter. Thus, the trial court exceeded its authority in remanding rather than dismissing, and an extraordinary remedy was warranted by the Tenth Circuit. Failure to grant such an extraordinary remedy is in direct contravention to the holding in *Thermtron Products*, and warrants the granting of a Petition for Certiorari to the Court of Appeals for the Tenth Circuit by this Court.

II. 28 U.S.C. § 1447(d) UNCONSTITUTIONALLY DEPRIVES A CERTAIN CLASS OF LITIGANTS OF THEIR ACCESS TO APPELLATE COURTS, THUS REQUIRING GRANTING OF THIS PETITION SO THAT THIS COURT CAN CONSIDER THIS IMPORTANT JURISDICTIONAL ISSUE

The granting of the Petition for Certiorari in *Thermtron Products*, demonstrates that this Court will grant certiorari under its supervisory powers to consider important jurisdictional issues. The Tenth Circuit's failure to consider the improper remand of this matter presents a similar need for review of an important jurisdictional issue. The application of § 1447(d), such as was made by the Tenth Circuit, results in an unconstitutional deprivation of access to an appellate court. The application of 28 U.S.C. § 1447(d) is unconstitutional under these circumstances both because it deprived Petitioner of equal protection under the law as well as due process.[1]

---

[1] It is well settled that the Fifth Amendment's due process clause encompasses equal protection principles. *Mathews v.*

(Continued on following page)

The result of the application of § 1447(d) in this instance is that Petitioner is denied any type of appellate review by nature of having removed the case to federal court. If Petitioner had been a defendant in a similar case originally brought in federal court, Petitioner would have a clearly established appellate right on jurisdictional issues. Here Petitioner is deprived of that right and of equal protection under the law. Interestingly, this equal protection problem was recognized by the Tenth Circuit in its order dismissing the action. In its order, the court stated as follows:

> Notwithstanding this, had the case originally been lodged in federal court, citizenship diversity would have been sufficient to vest the court with jurisdiction to hear the matter. *Prescott v. United States*, 523 F.Supp. 918 (D.C. Nev. 1981) (App. 4, n. 2).

As was noted by the trial court, § 1447(d) works to prevent appellate review of this action when, if the action had not been removed, review would be available.

Such a distinction between removal jurisdiction and original jurisdiction denies equal protection under the law to Petitioner. The type of equal protection violation which occurs here was discussed at length in *Mahone v. Addickes Utility District of Harris County*, 836 F.2d 921 (5th Cir. 1988). That court stated as follows:

(Continued from previous page)

de Castro, 429 U.S. 181, 182 (1976). Both the right to due process and to equal protection of the law claimed by Petitioner are based on U.S.Const.Amend.V (App. 10).

> The equal protection clause essentially requires that all persons similarly situated be treated alike. . . . Because the clause's protection reaches only dissimilar treatment among similar people, if the challenged government action does not appear to classify or distinguish between two or more relevant persons or groups, then the action does not deny equal protection of the laws.

Id. at 932 (citations omitted)

In the present case, the statute on its face does not appear to be discriminatory. However, the statute, as applied, deprives the defendant in a removed case of the right to appellate review of the subject matter jurisdiction when the defendant in a case which was originally brought in federal court would have that right to appellate review. Such a distinction violates the constitutional rights of Petitioner.

A due process analysis also reveals the constitutional problems with 28 U.S.C. § 1447(d). A due process analysis requires this court to determine whether the stated purpose to be served is legitimate and, if so, whether the means chosen to accomplish the purpose are reasonable and not arbitrary. *See, Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975). Here, the purpose of 28 U.S.C. § 1447(d) appears to be the management of the appellate court's docket, but the Court in *Thermtron Products*, recognized that this is not always a legitimate purpose. Certainly, it cannot be argued that to choose removed cases for such a deprivation of relief in the appellate courts, rather than other types of cases, is nothing short of an arbitrary determination without any foundation in law.

As has been demonstrated, 28 U.S.C. § 1447(d) presents a serious constitutional problem. This Court should, in the present instance, grant the petition for writ of certiorari to review this matter because of the important interest at stake. Petitioner, as well as others similarly affected is being deprived of its access to this Court. Such a deprivation is clearly a due process violation. The right to access to courts is a constitutional right. *See, e.g., California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972). Not only must Petitioner have access to courts, but Petitioner must also have access at a meaningful time in a meaningful manner. *See, Boddie v. Conneticut,* 401 U.S. 220 (1971). Failure to allow access to the appellate courts deprived Petitioner of access to courts "in a meaningful manner."

Petitioner is being deprived of its access to federal courts because Petitioner is deprived of appellate review of an erroneous ruling by the district court. This is a matter of significant interest not only in this particular case, but to all persons who exercise their right of removing a case to federal court pursuant to 28 U.S.C. § 1441. Moreover, it is an important question as to the parameters of federal appellate court jurisdiction. Thus, Petitioner urges that certiorari be granted in order that this Court may review the constitutionality of 28 U.S.C. § 1447(d).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS, GLASS, ATKINSON, HASKINS,
NELLIS & BOUDREAUX
MARTHANDA J. BECKWORTH
525 South Main, Suite 1500
Tulsa, OK 74103
(918) 582-8877

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM C. COOPER, Plaintiff-Appellee, v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, Defendant, and G.A.B. SERVICES, INC., Defendant-Appellant.	)	No. 90-5141

ORDER

Filed: March 1, 1991

Before McKAY, BALDOCK and EBEL, Circuit Judges.

This matter comes on for consideration of the appellee's motion to dismiss and request for sanctions and the response filed thereto.

Upon consideration thereof, the motion to dismiss is granted. A remand order is not reviewable by appeal or otherwise where the remand is based on the district court's determination that it is without jurisdiction. *See* 28 U.S.C. § 1447(d); *Gravitt v. Southwestern Bell Telephone Co.*,

430 U.S. 723 (1977) (per curiam); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). The appellee's request for sanctions is denied.

APPEAL DISMISSED.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM C. COOPER, Plaintiff, vs. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA; and G.A.B. SERVICES, INC., Defendants.	)	Case No. 90-C-2-B (Filed June 7, 1990)

ORDER

This matter comes on for consideration upon the Motion to Remand filed by Plaintiff, William C. Cooper. Additionally considered is the Motion to Dismiss, filed by the Defendants, National Union Fire Insurance Company of Pittsburgh, Pennsylvania and G.A.B. Services, Inc..

This action was initially filed in the District Court for Tulsa County, State of Oklahoma, the Plaintiff alleging bad faith insurance practices and intentional/negligent infliction of emotional distress. The matter grew out of a Workers' Compensation claim made by Plaintiff due to an injury suffered while an employee of Loffland Brothers, a corporation located in Tulsa, Oklahoma. Loffland Brothers was insured by Defendant National Union Fire Insurance Company, with Defendant G.A.B. administering the workers' compensation benefits under the policy. Plaintiff alleges Defendants failed to continue payments due him under the Workers' Compensation Award.[1]

---

[1] Plaintiff was awarded permanent disability benefits for 317.5 weeks at a rate of $163.00 per week, a total of $51,752.50, plus medical benefits and vocational rehabilitation benefits.

Defendants removed the matter to this court alleging diversity of citizenship and an amount in dispute being in excess of $50,000.00 Defendants simultaneously filed a Motion to Dismiss based upon lack of subject matter jurisdiction. The gravamen of Defendants' dismissal effort is that the Workers' Compensation Court of the State of Oklahoma has exclusive jurisdiction of cases arising out of state workmen's compensation laws.

Defendants have positioned themselves contradictorily. Either their removal from state court was improper or their current motion to dismiss is meritless.

Defendants could only validly remove this matter to federal court if it was *not* an action arising under the workmen's compensation laws of the State of Oklahoma. Civil actions arising under the state workmen's compensation laws are nonremovable. 28 U.S.C. §1445 (c). Diversity of citizenship does not abrogate §1445.[2] However, it has been held §1445 does not prevent removal from a state court of an action which involves *another* states workmen's compensation laws. See *Jackson v. Diamond M Co.*, D.C. Miss 1983, 575 F. Supp. 995, where an action in a Mississippi state court arising under the workmen's compensation laws of Louisiana was held removable to federal district court. The *Jackson* Court concluded that §1445, prohibiting removal of workmen's compensation

---

[2] Notwithstanding this, had the case originally been lodged in federal court, citizenship diversity would have been sufficient to vest the Court with jurisdiction to hear the matter. *Prescott v. U.S.* D.C. Nev. 1981, 523 F.Supp 918, affirmed 731 F.2d 1388.

cases, applied only to actions arising under that forum state's compensation laws.

In the instant matter, the threshold issue is whether Plaintiff's claim *arises* under the workmen's compensation laws of the State of Oklahoma. Apparently there is no dispute that Plaintiff has received all of the compensation award due him.[3] Plaintiff argues that facts giving rise to Plaintiff's claims for bad faith insurance practices and intentional infliction of emotional distress are directly connected to and arose under the payment of a Workers' Compensation Order. The Court agrees. In a similar case, this Court ruled that the Oklahoma Workers' Compensation Act provides the exclusive remedy for all claims of an injured worker until the Oklahoma legislature provides otherwise. *Joseph Edwin Roberts, et al vs. Commercial Union Insurance Company,* Case No. 88-C-540-B, D.C. N.D. of Oklahoma, Order entered October 20, 1988.

Having determined Plaintiff's claims arise under the Workers' Compensation laws of the State of Oklahoma,[4] the Court is logically drawn to the conclusion that removal from state court was improvident and remand should be granted.

---

[3] The Workers' Compensation Court entered an Order requiring the insurance carrier to pay the remainder of the award in a lump sum which the Court presumes, has been done in that the parties treat the matter as a *fait accompli.*

[4] Defendant attempts to tenuous distinction between a claim arising *under* the Workers Compensation laws and a claims arising *out of* a Workers' Compensation suit. The Court finds this distinction, under these facts, disingenuous.

It will be the Order of the Court that this matter be and the same is hereby REMANDED to the District Court for Tulsa County. Defendant's Motion to Dismiss is therefore OVERRULED as moot.

IT IS SO ORDERED this 7th day of June, 1990.

/s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without

jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

§ 1445. Nonremovable actions

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51 to 60 of Title 45, may not be removed to any district court of the United States.

(b) A civil action in any State court against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11707 of Title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.

(c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOSEPH EDWIN ROBERTS and ANNA LAURA ROBERTS, Plaintiffs,	)	No. 88-C-540-B
vs.	)	
COMMERCIAL UNION INSURANCE COMPANY, Defendant.	)	

ORDER

(Filed Oct. 20, 1988)

This matter comes before the Court on Defendant Commercial Union Insurance Company's motion to dismiss this case for lack of subject matter jurisdiction.

Plaintiff Joseph Edwin Roberts was injured while working on the job July 8, 1985. His employer, Copeland Steel Erectors, Inc. had workers' compensation insurance with Defendant Commercial Union Insurance Company. Temporary total disability payments were made from July 8, 1985 to July 22, 1985. Benefits were reinstated on November 18, 1985 and were terminated December 29, 1986. Plaintiff contends that his benefits were terminated in December 1986 based on a medical report which he received in the mail prior to his appointment to see the doctor who made the report.

Plaintiff filed a worker's compensation claim in the Workers' Compensation Court in September 1987 and filed the present action in June 1988 for breach of good faith and fair dealing. Defendant argues that this Court lacks subject matter jurisdiction over the claim filed in

this court and the exclusive remedy lies within the Workers' Compensation Court of the State of Oklahoma. Defendant cites 85 Okl.St.Ann. §§ 11 and 12:

> "Every employer subject to the provisions of the Workers' Compensation Act shall pay, or provide as required by the Workers' Compensation Act, compensation according to the schedules of the Workers' Compensation Act for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury. . . . The liability prescribed in Section 11 of this Title shall be exclusive and in place of all other liability of the employer and any of his employees, . . . at common law or otherwise, for such injury, loss of services, or death to the employee, . . . "

The Workers' Compensation Act provides penalties for failure to compensate. 85 Okl.St.Ann. §42 states:

> "If payment of compensation or an installment payment of compensation due under the terms of an award, . . . is not made within ten (10) days after the same is due . . . , the Court may order a certified copy of the award to be filed in the office of the court clerk and the county clerk of any county, which award . . . shall be entered on the judgment docket of the district court, and shall have the same force and be subject to the same law as judgments of the district court. Any compensation awarded and all payments thereof directed to be made by order of the Court shall bear interest at the rate of eighteen percent (18%) per year from the date ordered paid by the Court until the date of satisfaction. Upon the filing of the certified copy of the Court's award a writ of execution shall issue and process shall be executed and the cost

> thereof taxed, as in the case of writs of execution, on judgments of courts of record, as provided by the Code of Civil Procedure of the State of Oklahoma. If any insurance carrier intentionally, knowingly, or willfully violates any of the provisions of the Worker's Compensation Act, the Insurance Commissioner, on the request of a Judge of the Court or the Administrator, shall suspend or revoke the license or authority of such insurance carrier to do a compensation business in this state."

Rule 14 of the Workers' Compensation Act provides:

> "If the employer fails to continue payment of temporary compensation benefits after a Form 12 has been properly filed, the trial judge shall, at the time of trial, order the reinstatement of such benefits retroactive to the date benefits were terminated because of the employer's failure to follow this court rule. A fifteen percent (15%) penalty on all unpaid benefits shall be assessed against the employer at the date of trial. Further, the employer shall be required to file another Form 11 and fully comply with this rule before a trial on the motion to terminate temporary compensation will be conducted."

Plaintiff points out that 85 Okl.St.Ann. §101 provides all penalties under the Workers' Compensation Act are paid into the state treasury, not to Plaintiff. Although the penalty under Rule 14 of the Workers' Compensation Act may apply, the Court does not agree that the 18% interest imposed under 85 Okl.St.Ann. §42 falls under 85 Okl.St.Ann. §101.

Plaintiff points out this is not a claim against his employer for "such injury, loss of services or death of the employee" as outlined in the statute, but a claim for

recovery for the intentional bad faith breach by the insurance company. The Oklahoma Supreme Court has not addressed the issue. Other courts have held an independent claim for bad faith breach is not under the exclusive provisions of the Workers' Compensation laws similar to Oklahoma's laws. *Aranda v. Insurance Co. of North America,* 748 S.W. 2d 210 (Tex. 1988); and *Carpentino v. Transport Insurance Co.,* 609 F.Supp. 556, 561 (Conn. 1985).

Recently the Supreme Court of Texas in *Aranda v. Insurance Co. of North America, supra,* held that first, the exclusivity provision of the Workers' Compensation Act did not include a carrier's breach of duty of good faith. The court stated:

> "Injury from the carrier's conduct arises out of the contractual relationship between the carrier and the employee and is sustained after the job-related injury. This court has recognized that an employee may have one claim against his employer under the Act and another claim at common law for an intentional tort.
>
> Accordingly, we hold that the exclusivity provisions of the Worker's Compensation Act does not bar a claim against a carrier for breach of the duty of good faith and fair dealing or intentional misconduct in the processing of a compensation claim. A claimant is permitted to recover when he shows that the carrier's breach of the duty of good faith and fair dealing or the carrier's intentional act is separate from the compensable claim and produced an independent injury." (citations omitted).

Second, the court held the penalty provisions for nonpayment contained within the Workers' Compensation Act which are similar to Oklahoma's did not afford "relief to

the claimant when a carrier breaches the duty of good faith and fair dealing by refusing to pay benefits for a compensable claim until ordered to do so by the Industrial Accident Board." The court explained:

> "Even if these provisions addressed such misconduct, the Act does not contemplate that the failure of a carrier to act in good faith or the carrier's intentional tort can be meaningfully redressed by the mere addition of 12% or 15% to the past due compensation. Such nominal penalties are of questionable value as an incentive for the carrier to act reasonably in processing an employee's claim."

The Court of Appeals of Oklahoma has specifically held:

> "The Workers' Compensation statutes were designed to provide the exclusive remedy for accidental injuries sustained during the course and scope of a worker's employment. The statutes were not designed to shield employers or co-employees from willful, intentional or even violent conduct." *Thompson v. Madison Machinery Co.*, 684 P.2d 565 (Okla. App. 1984).

The Tenth Circuit Court of Appeals has also held that the exclusivity of the Act is only for "accidental" injury.

> "An 'intentional' injury is not 'accidental' for purposes of the Act however and is therefore not covered by the Act. That being the case an employer can be held liable at common law for injuries 'intentionally' inflicted on a covered employee." *Tyner v. Fort Howard Paper Co.*, 708 F.2d 517 (10th Cir. 1983).

However, Judge Seay in *Gilbert v. Home Indemnity Co.*, No. 86-048-C (E.D.Okla. 1986) held that concerning a claim for bad faith breach of an insurance contract "the

Oklahoma Workers' Compensation Act provides the exclusive remedy for an injured employee for compensation against an employer and the employer's carrier. The appropriate relief sought by plaintiff against defendant is under the Oklahoma Workers' Compensation Act."

The Tenth Circuit Court of Appeals found that the New Mexico Workers' Compensation Act provided the exclusive remedy for a bad faith denial of a workers' compensation claim. The court stated "Plaintiff's contention that the tort claims asserted in this action are separate and apart from the Plaintiff's claims for compensation under the Workman's Compensation Act is without merit." The court reasoned:

> "The Act clearly contemplates that an employer may deny a workman's claim for compensation benefits, but if he does, the Act provides the workman with a remedy. The remedy is the same whether the denial is made in good faith or bad faith."

Courts in other jurisdictions have reached similar results. *Whitten v. American Mutual Liability,* 468 F.Supp. 470 (Dist.S.C. 1977); *Young v. United States Fidelity and Guaranty Co.,* 588 S.W.2d 46 (Mo. 1979) (However the Missouri Act doubles the entire award for failure to compensate); *Gonzales v. United States Fidelity,* 659 P.2d 318 (N.M. 1983); *Robertson v. Travelers Insurance Co.,* 448 N.E. 2d 866 (Ill. 1983).

This Court concludes the Oklahoma Workers' Compensation Act provides the exclusive remedy for Plaintiff until the Oklahoma legislature provides alternatives. Defendant's motion to dismiss is hereby sustained.

Plaintiff's appeal of the Magistrate's protective order staying discovery pending the outcome of this motion is moot.

IT IS SO ORDERED this 20th day of October, 1988.

/s/ Thomas R. Brett
Thomas R. Brett
United States District Judge

(2)

No. 91-6

Supreme Court, U.S.
FILED
JUL 29 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

G.A.B. SERVICES, INC.,

Petitioner,

vs.

WILLIAM C. COOPER; and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JACK G. ZURAWIK
Counsel of Record
MICHAEL R. GREEN
LAW OFFICES OF DANIEL W. LOWE, P.C.
1401 South Cheyenne
Tulsa, Oklahoma 74119
(918) 582-2500
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The United States District Court for the Northern District of Oklahoma remanded this removed action, holding that "Respondent, William C. Cooper's claims arise under the Workers' Compensation laws of the State of Oklahoma", and thus, is not removable pursuant to 28 U.S.C. § 1445(c). The Tenth Circuit held that it did not have jurisdiction to consider the appeal of the district court ruling, pursuant to 28 U.S.C. § 1447(d). The questions presented are:

1. Whether the Tenth Circuit Court of Appeals or the United States Supreme Court has jurisdiction to review an order remanding a case to state court on the grounds that remand was improvidently granted.

2. Whether the United States District Court for the Northern District of Oklahoma exceed its statutory authority in 28 U.S.C. § 1447(c), and 28 U.S.C. § 1445(c), in remanding this case to the Oklahoma State District Court within and for Tulsa County, State of Oklahoma.

PARTIES TO THE PROCEEDING

1. William C. Cooper
2. G.A.B. Services, Inc.
3. National Union Fire Insurance Company of Pittsburgh, Pennsylvania

LIST OF AFFILIATED CORPORATIONS

1. C.H. & A., INC.
2. I.N.S. Investigations
3. Inter-Modal Technical Services, Inc.
4. Inter-Modal Transportation, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
LIST OF AFFILIATED CORPORATIONS	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR NOT GRANTING THE PETITION	4
I. THE TENTH CIRCUIT DID NOT HAVE JURISDICTION TO REVIEW THE ORDER FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA REMANDING THIS CASE TO STATE COURT ON THE GROUNDS THAT REMAND WAS IMPROVIDENTLY GRANTED	4
II. DID THE FEDERAL DISTRICT COURT EXCEED ITS STATUTORY AUTHORITY 28 U.S.C. §§ 1445(c) AND 1447 (c) IN REMANDING THIS ACTION TO THE STATE COURT?	9
CONCLUSION	12
Court of Appeals Opinion	App. 1
District Court Opinion	App. 3
28 U.S.C. § 1441	App. 7
28 U.S.C. § 1445	App. 9
28 U.S.C. § 1447	App. 10
Watson v. Liberty Mutual Fire Ins. Co., 715 F.Supp 797 (W.D. Tex. 1989)	App. 11

TABLE OF AUTHORITIES

Page

CASES

Carnegie-Mellon University v. Cohill, 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed.2d 729 (1988) 5, 6, 8

Gravitt v. Southwestern Bell Telephone Company, 430 U.S. 723, 97 S.Ct. 1439, 52 L.Ed.2d 1 (1977) 9

Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976) ..... *passim*

Volvo Corporation v. Schwarzer, 429 U.S. 1331, 97 S.Ct. 284, 50 L.Ed.2d 273 (1976) 10

Watson v. Liberty Mutual Fire Insurance Co., 715 F.Supp. 797 (1989) 7, 8

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1441 ..... 2, 5, 10

28 U.S.C. § 1445 2

28 U.S.C. § 1445(c) ..... *passim*

28 U.S.C. § 1446 ..... 5, 10

28 U.S.C. § 1447 2

28 U.S.C. § 1447(c) ..... *passim*

28 U.S.C. § 1447(d) 4, 5, 6, 8

MISCELLANEOUS

H.R. Rep. No. 100-889 at 72, U.S. Code Cong. & Admin. News 1988 11

No. 91-6

In The

Supreme Court of the United States

October Term, 1991

G.A.B. SERVICES, INC.,

Petitioner,

vs.

WILLIAM C. COOPER; and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

William C. Cooper respectfully responds to G.A.B. Services, Inc.'s Petition for Writ of Certiorari to review the Order of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1) is unreported. The opinion of the district court (App. 3) is unreported.

JURISDICTION

The Order of the Court of Appeals was entered on March 1, 1991, Petitions for Rehearing were not filed in this matter. On May 30, 1991, Justice White extended the time for filing a Writ of Certiorari to and including, July 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 28 U.S.C. §1441; 28 U.S.C. §1445; 28 U.S.C. §1447; which are fully set forth in the Appendix.

STATEMENT OF THE CASE

This is an action sounding in bad faith refusal to pay insurance benefits and intentional infliction of emotional distress. The action was originally brought in the District Court of the State of Oklahoma in Tulsa County. The matter was timely removed by Petitioner, G.A.B. Services, Inc., who filed its Notice of Removal to the United States District Court along with a Motion to Dismiss and Brief in Support on January 2, 1990. Respondent, William C. Cooper filed his Motion for Remand and Brief in Support on January 16, 1990. Petitioner, G.A.B. Services, Inc., filed its Response to Respondent, William C. Cooper's Motion for Remand on January 31, 1990. Judge Brett issued an Order on June 7, 1990, finding that removal was

inappropriate as facts giving rise to Respondent's claims for bad faith insurance practices and intentional infliction of emotional distress are directly connected to and arise under the payment of a Workers' Compensation Order and pursuant to 28 U.S.C. §1445(c) are not to be removed to any District Court of the United States.

This action arose when Respondent, William C. Cooper, an employee of Loffland Brothers, was injured in the course of his employment, on January 10, 1985. William C. Cooper filed a Workers' Compensation claim against his employer on September 12, 1986, and was awarded Permanent Partial Disability payments on October 31, 1988. In this action, William C. Cooper the Respondent, National Union Fire Insurance Company of Pittsburgh, Pennsylvania, and Petitioner, G.A.B. Services, Inc., the administrator of the benefits, wrongfully refused to make the payments ordered by the Oklahoma Workers' Compensation Court on October 31, 1988.

This action was originally brought in the District Court of the State of Oklahoma in Tulsa County, and was removed to the United States District Court for the Northern District of Oklahoma. Simultaneously with the filing of removal papers, Petitioner, filed a Motion to Dismiss arguing that the Oklahoma Workers' Compensation Act provided an exclusive remedy. William C. Cooper filed an Objection to the Motion to Dismiss, as well as a Motion to Remand, arguing that this action was one that arises under the Oklahoma Workers' Compensation Act, and was therefore, not removable pursuant to 28 U.S.C. §1445(c). On June 7, 1990, the trial court ordered

that this matter be remanded to state court. G.A.B. Services, Inc., filed a notice of appeal on July 6, 1990.

During the course of appeal, Respondent, William C. Cooper, filed a Motion to Dismiss the appeal and a request for attorney's fees. William C. Cooper's Motion to Dismiss was based on 28 U.S.C. §§1447(c)(d) and §1445(c). The Tenth Circuit Court of Appeals, on September 7, 1990, required that memorandum briefs be filed by all parties in support of their respective positions on the jurisdictional issue. Petitioner in this matter filed a memorandum brief with the Tenth Circuit, arguing that, while a direct appeal may not be possible, circumstances warranted an extraordinary remedy and that the application of 28 U.S.C. §1447(d) was unconstitutional in that it violated Petitioner's rights to equal protection under the law and deprived Petitioner of its recourse to an appellate court. In response, Respondent, William C. Cooper, filed his memorandum brief arguing that the United States District Court for the Northern District of Oklahoma did not exceed his statutory authority pursuant to 28 U.S.C. §1447(c), and 28 U.S.C. §1445(c) by remanding this matter to the state court.

REASONS FOR NOT GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THE TENTH CIRCUIT DID NOT HAVE JURISDICTION TO REVIEW THE ORDER FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA REMANDING THIS CASE TO STATE COURT ON THE GROUNDS THAT REMAND WAS IMPROVIDENTLY GRANTED.

The United States Supreme Court's decisions as to the reviewability and propriety of a remand order is

governed by this court's decisions in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S. Ct. 584, 46 L.Ed. 2d 542 (1976), and *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 108 S. Ct. 614, 98 L.Ed.2d 720 (1988).

In *Thermtron*, the Defendants had removed a diversity case to Federal Court in full compliance with the jurisdictional and procedural requirements set out in 28 U.S.C. §§ 1441 and 1446. The District Court's opinion acknowledged that Petitioners had properly removed the case. Nevertheless, the District Judge remanded the case to State Court on the grounds that because his docket was crowded and diversity cases were assigned the lowest priority for available trial time, the Plaintiffs would get a speedier trial in state court. While recognizing that Defendants had a statutory right to remove the action, the Judge believed that the rights must be "balanced against the Plaintiffs' rights to a forum of their choice and their right to a speedy decision on the merits." *See Thermtron*, 423 U.S. at 340, 96 S. Ct. at 587. The Defendants, of course, appealed.

The question before the Supreme Court in *Thermtron* was whether, in light of the prohibition on review of remand orders set out in 28 U.S.C. §1447(d)[1] the Court of Appeals had jurisdiction to review the district court's order. Answering in the affirmative, the court reasoned that the ban on review in 28 U.S.C. §1447(d) was to be

---

[1] 28 U.S.C. §1447(d) provides, in pertinent part: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . "

construed *in pari materia* with the grounds for remand stated in 28 U.S.C. §1447(c).[2]

This Court *first* held that a district court may not remand a case to state court on discretionary grounds not authorized by §1447(c). See *Thermtron*, 423 U.S. at 345, 351, 96 S. Ct. at 590, 593. *Second*, this court held that the bar against review of remand orders contained in §1447(d) applies only to remand orders authorized by §1447(c). *Id.* at 346, 96 S. Ct. at 590. *Third*, this Court held that where district court issues a remand order on grounds not authorized by §1447(c), the order is reviewable by writ of mandamus. *Id.* at 352-353, 96 S. Ct. at 593-94. Applying these rules, the court found that the district court had exceeded its authority under §1447(c) and that a writ of mandamus should issue to require the district court to entertain the remand action.

In the subsequent case of *Carnegie-Mellon*, this court revised the first rule and affirmed a discretionary remand based on the doctrine of pendent jurisdiction. The *Carnegie-Mellon* Court held that where a case is properly removed on the basis of federal question jurisdiction, and the federal question claim drops out of the lawsuit early in the litigation, the district court may, in its discretion, dismiss or remand any remaining pendent state law claims, even though such a remand is not authorized by §1447(c).

---

[2] 28 U.S.C. §1447(c) provides, in pertinent part: "A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under Section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded . . . "

In light of these two cases, this Court must decide whether the remand in the instant case was authorized by §1447(c). This court, in *Thermtron*, emphasized that review was available only because a district court remand order did not purport to remand on a ground authorized by §1447(c). However, in the case at bar, Judge Brett in his remand order determined that Respondent's claims arose under the Workers' Compensation Laws of the State of Oklahoma and that removal from State court was improvident and remand should be granted. The United States District Court relied upon 28 U.S.C. §1445(c).[3] A case directly on point with the case before this Court is *Watson v. Liberty Mutual Fire Insurance Company*, 715 F.Supp. 797 (W.D. Tex. 1989) (App. 9). In that case, the Plaintiff brought a claim in State District Court for a balance of an award from the Texas Industrial Accident Board and for recovery due to the breach of an insurance carrier's duty of good faith and fair dealing. The Court remanded the case to the State District Court stating that "the claim for breach of duty of good faith and fair dealing presupposes the existence of Workers' Compensation benefits due and owing to the Plaintiff, which the carrier has failed to pay." *Id.* at 798. The Court concluded that this was sufficient to conclude that the claim arose "under the Workers' Compensation laws of the State of Texas for the purposes of the removal statute, 28 U.S.C. §1445(c)." *Id.* at 798. The facts in the case at bar are identical to the *Watson* case, supra.

---

[3] 28 U.S.C. §1445(c) provides, in pertinent part: "A civil action in any State court arising under the Workers' Compensation laws of such State may not be removed to any District Court of the United States."

In the case at bar, the Respondent received an Order from the Oklahoma Workers' Compensation Court and the insurance carrier began to make payments and then for no apparent reason ceased to pay on the Order as issued by the Workers' Compensation Court. It is this breach of the Petitioner's obligation that gives rise to this case at hand. See *Watson*, 715 F. Supp. 797 (W.D. Tex. 1989) (App. 9). In essence the United States District Court found that the case was improvidently removed and ordered it remanded to the State District Court in accordance with 28 U.S.C. §1445(c).

To determine what improvidently means one must look to *Thermtron* and *Carnegie-Mellon* where this Court determined that the term "improvidently" means no more than the word "improperly." See *Thermtron*, 423 U.S. at 336 n.15, 96 S.Ct. at 592 n.15 ("[t]hat the word "improperly" in the old law was changed to "improvidently" in §1447(c) . . . is of no moment") and 343-44 (emphasizing that a "properly removed action" may not be remanded); *See also Carnegie-Mellon*, 484 U.S. 343 108 S.Ct. at 621.

Therefore once the Federal District Court found statutory authority, 28 U.S.C. §1445(c) which precluded it from assuming jurisdiction it had no other avenue but to find that removal was improvidently granted; remanding this case to the proper State District Court. Since the Federal District Court followed 28 U.S.C. §1445(c) in determining that removal was improvidently granted, the United States Court of Appeals for the Tenth Circuit was precluded by statute from reviewing the Federal District Court's decision pursuant to 28 U.S.C. §1447(d).

The Federal District Court did not exceed its statutory authority in remanding this case to the State court,

as was the case in both the *Thermtron* and *Carnegie-Mellon* instances. The Federal District court found that Respondent's claims arose under the Workers' Compensation laws of the State of Oklahoma and that removal from the State court was improvidently granted pursuant to 28 U.S.C. §§1445(c) and 1447(c).

II. DID THE FEDERAL DISTRICT COURT EXCEED ITS STATUTORY AUTHORITY, 28 U.S.C. §1445(C) AND 28 U.S.C. §1447(C) IN REMANDING THIS ACTION TO THE STATE COURT?

In determining if the district court exceeded its authority under 28 U.S.C. §1447(c) the *Thermtron* court repeatedly emphasized that district courts may not remand properly removed cases "for discretionary reasons not authorized by the controlling statute." See *Thermtron*, 423 U.S. at 345 n.9, 96 S. Ct. at 590 n.9. In the instant case the Court relied on 28 U.S.C. §1445(c) as its statutory authority to remand this case finding that William C. Cooper's claim arises under the Workers' Compensation Laws of the State of Oklahoma and that removal from State court was improvident.

Congress immunized all forms of Appellate review of any remand order issued on the grounds specified in 28 U.S.C. §1447(c), whether or not that Order might be deemed erroneous by an Appellant Court. *Thermtron v. Hermansdorfer*, 423 U.S. at 351, 96 S.Ct. at 593 (emphasis added). Thus if the district court were to remand, say, on the ground that diversity jurisdiction were lacking, no matter how erroneous the decision may be, the decision is unreviewable. *Gravitt v. Southwestern Bell Telephone Company*, 430 U.S. 723, 97 S. Ct. 1439, 52 L.Ed.2d 1 (1977);

Volvo Corporation v. Schwarzer, 429 U.S. 1331, 97 S.Ct. 284, 50 L.Ed.2d 273 (1976).

The removal statutes grant a right to a federal forum. The motivating concern for granting that statutory right was to protect litigants against local prejudice, influence and discrimination. If a district court judge, were permitted to order a case remanded on the discretionary ground that his docket is too crowded, he would be in a position to subvert the fairness concerns underlying the statutes. Although errors will inevitably occur when applying any ground for remand, the same potential for abuse is not present where the remand is based on a non-discretionary ground such as the instant case pursuant to 28 U.S.C. §1445(c).

While *Thermtron* did not specify the universe of grounds for remand contained in §1447(c), *Thermtron* court strongly indicated that it viewed the phrase "improvidently and without jurisdiction" to mean non-compliance with the procedural or jurisdictional requirements stated by Congress. Stressing the fact that the case in *Thermtron* had been properly removed, the Court repeatedly referred to the petitioner's compliance with the jurisdictional and procedural requirements of 28 U.S.C. §1441 and 28 U.S.C. §1446. See *Thermtron v. Hermansdorfer*, 423 U.S. at 338, 339, 340, 344 n.8, 96 S. Ct. at 586, 587, 588, 5849 n.8.

The recent removal statute effected by the Judicial Improvement and Access to Justice Act are also instructive. Congress has revised 28 U.S.C. §1447(c) to replace the two grounds of "improvidently" and "without jurisdiction" with the grounds of "defect in removal procedure" and "lack [of] subject matter jurisdiction." Pub.L.

100-702, 102 Stat. 4642, 4670. Replacing the word "improvidently" with "defect in removal procedure" is consistent with the view that "improvidently" draws its meaning from the procedural rules set out in the removal statutes. Indeed, the House Report accompanying the 1988 revisions specifically equates the term "improvident" as used in 28 U.S.C. §1447(c) with the phrase "defect in removal procedure" as used in the amended provision. See H.R. Rep. No. 100-889 at 72, U.S. Code Cong. & Admin. News 1988, pp. 5982, 6033.[4]

The trial court remanded this action to State Court, a Court which does have jurisdiction over this matter pursuant to 28 U.S.C. §1445(c). Thus the trial court did not exceed its authority in remanding this case to State court

---

[4] The 1988 revisions place a 30-day limit within which remand on non-jurisdictional grounds must be sought. In explaining the purpose of the amendment, the House Report states:

> Subsection (c) amends 28 U.S.C. 1447(c) and adds a new subsection (e). Section 1447(c) now appears to require remand to state court if at any time before final judgment it appears that the removal was improvident. So long as the defect in removal procedure does not involve lack of federal subject matter jurisdiction, there is no reason why either State or Federal courts, or the parties, should be subject to the burdens of shutting a case between two courts that each have subject matter jurisdiction.

H.R. Rep. No. 100-889 at 72 (emphasis added), U.S. Code Cong. & Admin.News, 1988, p. 6033. This statement appears to include within the terms "improvident" both defect in removal procedure and lack of jurisdiction, which under our disjunctive reading of the phrase "improvidently and without jurisdiction" is unnecessary. The important point is that Congress specifically links the term "improvident" to procedural defects.

and the Tenth Circuit did not exceed its authority by not reviewing the appeal from the Federal District Court. The petitioners are not entitled to an extraordinary remedy in this particular instance as the Federal District Court did not exceed its statutory authority in remanding this action to the proper State court pursuant to 28 U.S.C. §1445(c) and 28 U.S.C. §1447(c).

Respondent hereby requests that this Court award attorney's fee and costs pursuant to 28 U.S.C. §1447(c).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LAW OFFICES OF DANIEL W. LOWE, P.C.
JACK G. ZURAWIK
Counsel of Record
MICHAEL R. GREEN
1401 S. Cheyenne
Tulsa, Oklahoma 74119
(918) 582-2500

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM C. COOPER,

Plaintiff-Appellee,

v. No. 90-5141

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA

Defendant,

and

G.A.B. SERVICES, INC.,

Defendant-Appellant.

ORDER

Filed: March 1, 1991

Before McKAY, BALDOCK and EBEL, Circuit Judges.

This matter comes on for consideration of the appellee's motion to dismiss and request for sanctions and the response filed thereto.

Upon consideration thereof, the motion to dismiss is granted. A remand order is not reviewable by appeal or otherwise where the remand is based on the district court's determination that it is without jurisdiction. See 28 U.S.C. § 1447(d); *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977) (per curiam); *Thermtron Products,*

Inc. v. Hermansdorfer, 423 U.S. 336 (1976). The appellee's request for sanctions is denied.

APPEAL DISMISSED.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM C. COOPER,

Plaintiff,

v. Case No. 90-C-2-B

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA; and G.A.B. SERVICES, INC., (Filed June 7, 1990)

Defendants.

ORDER

This matter comes on for consideration upon the Motion to Remand filed by William C. Cooper. Additionally considered is the Motion to Dismiss, filed by the Defendants, National Union Fire Insurance Company of Pittsburgh, Pennsylvania and G.A.B. Services, Inc.

This action was initially filed in the District Court for Tulsa County, State of Oklahoma, the Plaintiff alleging bad faith insurance practices and intentional/negligent infliction of emotional distress. The matter grew out of a Workers' Compensation claim made by Plaintiff due to an injury suffered while an employee of Loffland Brothers, a corporation located in Tulsa, Oklahoma, Loffland Brothers was insured by Defendant National Union Fire Insurance Company, with Defendant G.A.B. administering the workers' compensation benefits under the policy. Plaintiff alleges Defendants failed to continue payments due him under the Workers' Compensation Award.[1]

---

[1] Plaintiff was awarded permanent disability benefits for 317.5 weeks at a rate of $163.00 per week, a total of $51,752.50, plus medical benefits and vocational rehabilitation benefits.

Defendants removed the matter to this Court alleging diversity of citizenship and an amount in dispute being in excess of $50,000.00 Defendants simultaneously filed a Motion to Dismiss based upon lack of subject matter jurisdiction. The gravamen of Defendants' dismissal effort is that the Workers' Compensation Court of the State of Oklahoma has exclusive jurisdiction of cases arising out of state workmen's compensation laws.

Defendants have positioned themselves contradictorily. Either their removal from state court was improper or their current motion to dismiss is meritless.

Defendants could only validly remove this matter to federal court if it was not an action arising under the workmen's compensation laws of the State of Oklahoma. Civil actions arising under the state workmen's compensation laws are nonremovable. 28 U.S.C. § 1445(c). Diversity of citizenship does not abrogate § 1445.[2] However, it has been held § 1445 does not prevent removal from a state court of an action which involves another state's workmen's compensation laws. See *Jackson v. Diamond M Co.*, (D.C. Miss 1983), 575 F.Supp 995, where an action in a Mississippi state court arising under the workmen's compensation laws of Louisiana was held removable to federal district court. The *Jackson* Court concluded that § 1445, prohibiting removal of workmen's compensation

---

[2] Notwithstanding this, had the case originally been lodged in federal court, citizenship diversity would have been sufficient to vest the court with jurisdiction to hear the matter. Prescott v. U.S. D.C. Nev. 1981, 523 F.Supp 918, affirmed 731 F.2d 1388.

cases, applied only to actions arising under that forum state's compensation laws.

In the instant matter, the threshold issue is whether Plaintiff's claim arises under the workmen's compensation laws of the State of Oklahoma. Apparently there is no dispute that plaintiff has received all of the compensation award due him.[3] Plaintiff argues that facts giving rise to Plaintiff's claims for bad faith insurance practices and intentional infliction of emotional distress are directly connected to and arose under the payment of a Workers' Compensation Order. The Court agrees. In a similar case, this Court ruled that the Oklahoma Workers' Compensation Act provides the exclusive remedy for all claims of an injured worker until the Oklahoma legislature provides otherwise. *Joseph Edwin Roberts, et al. vs. Commercial Union Insurance Company,* Case No. 88-C-540-B, D.C. N.D. of Oklahoma, Order entered October 20, 1988.

Having determined Plaintiff's claims arise under the Workers' Compensation laws of the State of Oklahoma,[4] the Court is logically drawn to the conclusion that removal from state court was improvident and remand should be granted.

---

[3] The Workers' Compensation Court entered an Order requiring the insurance carrier to pay the remainder of the award in a lump sum which the Court presumes, has been done in that the parties treat the matter as a fait accompli.

[4] Defendant attempts to tenuous distinction between a claim arising under the Workers Compensation laws and a claim arising out of a Workers' Compensation suit. The Court finds this distinction, under these facts, disingenuous.

It will be the Order of the Court that this matter be and the same is hereby REMANDED to the District Court for Tulsa County. Defendant's Motion to Dismiss is therefore OVERRULED as moot.

IT IS SO ORDERED this 7th day of June, 1990.

/s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES
DISTRICT JUDGE

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters in which state law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the Court without

jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

§ 1445. Nonremovable actions.

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under Sections 51 to 60 of Title 45, may not be removed to any district court of the United States.

(b) A civil action in any State court against a common carrier or its receivers or trustees to recover damages for delay, loss or injury of shipments, arising under section 11707 of Title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000.00 exclusive of interest and costs.

(c) A civil action in any State court arising under the Workmen's Compensation laws of such State may not be removed to any district court of the United States.

§ 1447. Procedure after removal generally.

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed to the clerk of the State Court. The state court may thereupon proceed with such case.

(d) An order remanding a case to the State court forum which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State Court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants, whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the state court.

Mary WATSON, Plaintiff,

v.

LIBERTY MUTUAL FIRE INSURANCE COMPANY, Defendant.

No. EP-89-CA-123-H.

United States District Court,
W.D. Texas,
El Paso Division.

May 30, 1989.

Michael T. Aaronson, El Paso, Tex., for plaintiff.

Jeffrey S. Alley, Scott, Hulse, Marshall, Feuille, Finger & Thurmond, El Paso, Tex., for defendant.

ORDER OF REMAND

HUDSPETH, District Judge.

Plaintiff Mary Watson filed suit in the 171st District Court of El Paso County, Texas, against her employer's workers' compensation insurance carrier. In her original petition in state court, the Plaintiff alleged that she was injured in the course and scope of her employment; that she filed a claim for compensation under the Texas Workers' Compensation Act; that the Texas Industrial Accident Board awarded her benefits in the amount of $14,582.78, but that the Defendant has paid her only the sum of $5,474.78, leaving a balance due and owing in the amount of $9,108.00. The Defendant filed a petition for removal to this Court, contending that the United States District Court had original jurisdiction over the action

under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1332 (diversity of citizenship and jurisdictional amount). The Plaintiff filed a motion to remand the cause to state court. The Court finds that the motion to remand should be granted.

The Defendant's claim that this Court has original jurisdiction over the suit under 28 U.S.C. § 1332 is not supported by the pleadings. The Plaintiff's original petition makes no allegations concerning the citizenship of the Plaintiff or the Defendant. The Defendant's answer is similarly silent as to this matter. The only allegations concerning citizenship are found in the Defendant's notice of removal. Furthermore, the pleadings fail to establish that the amount in controversy exceeds $10,000.00 exclusive of interest and costs. The only specific amount of damages claimed by the Plaintiff is $9,108.00. Without diversity of citizenship and jurisdictional amount, this Court lacks jurisdiction under 28 U.S.C. § 1332.

The Defendant's claim of federal question jurisdiction under 28 U.S.C. § 1331 is based upon the theory that the Texas Workers' Compensation Act has been preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 101 *et seq*. Significantly, no authority is cited in support of this novel proposition. On the contrary, this case comes within a category of cases specifically made nonremovable by Congress. Title 28, United States Code, § 1445(c) provides as follows:

> A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

The instant case clearly arises under the Texas Workers' Compensation Act, even though the Plaintiff pleads an alternative theory of recovery under the common-law doctrine of breach of duty of good faith and fair dealing. The potential existence of such a duty on the part of a workers' compensation carrier was recognized by the Texas Supreme Court in *Aranda v. Insurance Company of North America*, 748 S.W.2d 210 (Tex.1988). As the Supreme Court stated in that opinion:

> A workers' compensation claimant who asserts that a carrier has breached the duty of good faith and fair dealing by refusing to pay or delaying payment of a claim must establish (1) the absence of a reasonable basis for denying or delaying payment of the benefits of the policy *and* (2) that the carrier knew or should have known that there was not a reasonable basis for denying the claim or delaying payment of the claim. *Aranda v. Insurance Company of North America, supra* at 213.

In other words, the claim for breach of duty of good faith and fair dealing presupposes the existence of workers' compensation benefits due and owing to the Plaintiff, which the carrier has failed to pay. Both classes of claims arise under the workers' compensation laws of the State of Texas for purposes of the removal statute, 28 U.S.C. § 1445(c). In the instant case, Section 1445(c) bars its removal to this Court.

It is therefore ORDERED that this cause be, and it is hereby, REMANDED to the 171st District Court of El Paso County, Texas. The District Clerk is directed to transmit the file to the District Clerk of El Paso County, Texas.

---

(3)

No. 91-6

Supreme Court, U
FILED
AUG 5 199
OFFICE OF THE CLE

In The

Supreme Court of the United States

October Term, 1991

G.A.B. SERVICES, INC.,

Petitioner,

v.

WILLIAM C. COOPER; and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,

Respondents.

PETITIONER'S REPLY BRIEF

MARTHANDA J. BECKWORTH
Counsel of Record
THOMAS, GLASS, ATKINSON, HASKINS,
NELLIS & BOUDREAUX
525 South Main, Suite 1500
Tulsa, OK 74103
(918) 582-8877

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

This appeal concerns the trial court's improper remand of an action sounding in bad faith and intentional infliction of emotional distress. Further, the appeal concerns the Tenth Circuit's failure to consider the trial court's Order on appeal. However, the sole purpose of submitting this Reply Brief is to respond to Respondents' closing sentence in its Brief in Opposition to Petitioner's Petition for Certiorari which requests as follows: "Respondent hereby requests that this Court award attorney's fees and costs pursuant to 28 U.S.C. § 1447(c)."

Respondent requested attorney's fees and costs pursuant to 28 U.S.C. § 1447(c) in its original motion to remand in the trial court. However, this request was not ruled on by the trial court in its Order of Remand filed on June 7, 1990. Notably, Respondent did not pursue his request for costs and attorney's fees pursuant to § 1447(c) in the trial court nor did Respondent counter-appeal on this issue to the Tenth Circuit.

It is elementary that, if a party wants affirmative relief from an appellate court, that party has the responsibility for bringing the issue to the court in the form of a cross-appeal. In *Letulle v. Scofield*, 308 U.S. 415 (1940), the Court held as follows:

> A respondent or an appellee may urge any matter appearing in the record in support of a judgment, but he may not attack it even on grounds asserted in the court below, in an effort to have this court reverse it, when he himself has not sought a review of the whole judgment, or that portion which is adverse to him.

Id. at 421-422

By the *Letulle* Court's ruling, Respondent would have had the obligation to seek review of the trial court's failure to award him costs and attorney's fees. Respondent took no such action in the Tenth Circuit, and has not attempted until now to take that action in the United States Supreme Court.

Similarly, the Court, in *Penfield Co. of California v. Securities and Exchange Commission*, 330 U.S. 585 (1947), ruled that a respondent could not raise an issue in its response to a petition for certiorari when it had failed to raise the issue on appeal. That Court stated:

> Young raises objections that go to the merits of the judgment of contempt. These were considered and determined against him by the district court. Since he did not appeal from that adverse judgment, he is precluded from renewing the objections at this stage.

Id. at 594

Respondent's statement is merely an attempt to cloud the issues before this Court. The issue here is not the appropriateness of costs, which was never appealed to the Tenth Circuit. Rather, the issue focuses on the Tenth Circuit's decision which is in conflict with this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), and on the unconstitutional nature of the Tenth Circuit's application of § 1447(d) in these circumstances.

For the reasons stated in the Petition, certiorari should be granted. However, for the reasons above-stated, Respondent's request for attorney's fees and costs should be denied.

Respectfully submitted,

THOMAS, GLASS, ATKINSON, HASKINS, NELLIS & BOUDREAUX
MARTHANDA J. BECKWORTH, OBA #10204
525 South Main, Suite 1500
Tulsa, OK 74103
(918) 582-8877